No. 89-1587 (5)



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

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REYNOLDS METALS COMPANY,
*Petitioner,*

v.

JAMES M. SIZEMORE, JR.,
as Commissioner of Revenue of the State of Alabama,
*Respondent.*

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**On Petition for a Writ of Certiorari to the Supreme Court of Alabama**

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## REPLY BRIEF

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JOHN BARRY DONOHUE, JR.
ROBERT ALAN WARWICK *
* *Counsel of Record*
Reynolds Metals Company
6601 West Broad Street
Richmond, Virginia 23230
(804) 281-4607

BRUCE A. RAWLS
F. A. FLOWERS, III
Burr & Forman
3000 Southtrust Tower
Birmingham, Alabama 35203
(205) 251-3000

WALTER HELLERSTEIN
Professor of Law
University of Georgia,
School of Law
Athens, Georgia 30602
(404) 542-5175

*Counsel for Petitioner*
*Reynolds Metals Company*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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## REPLY BRIEF

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### STATEMENT REQUIRED BY RULE 29.1

Petitioner, Reynolds Metals Company, is a corporation whose stock is publicly traded on the New York Stock Exchange and is not a subsidiary of any other corporation. There has been no change in the List of Subsidiaries included in Reynolds' Petition at 66a-67a.

### ARGUMENT IN REPLY

Respondent's Brief in Opposition jettisons the factual foundation and the central reasoning of the Alabama Supreme Court's decision and parades a series of red herrings. The court below, relying on record evidence, explicitly found that Alabama's franchise tax scheme creates a "discrepancy" between foreign and domestic

corporations. Reynolds' Petition (hereinafter "Pet.") App. 20a. Yet Respondent now contends that no such "specific conclusions" may be drawn from the evidence. Brief in Opposition (hereinafter "Opp.") 3. The court below also declared that the "ultimate question in applying either equal protection or commerce clause analysis" to the facts of this case "is virtually the same" and that neither clause is offended unless the tax "invidiously discriminates" against foreign corporations. Pet. App. 18a. Yet Respondent now contends that "the Alabama Supreme Court knows the difference between the Equal Protection Clause and the Commerce Clause." Opp. 9.

Perhaps Respondent had no choice. Faced with undisputed evidence of discrimination and an opinion that justified the discrimination on untenable grounds, Respondent's only recourse was to abandon the Alabama court's opinion and attempt to manufacture a more favorable factual and legal setting. Respondent's efforts to discredit the factual record and to rewrite the opinion below should not be permitted to distract this Court from the significant issues presented by this case.

The decision below should be reviewed. It creates a set of novel and exceedingly dangerous principles that amounts to *carte blanche* for discriminatory taxation of foreign corporations at a time when States are under enormous pressure to generate additional revenue.

## I. RESPONDENT'S BRIEF CONTAINS MISSTATEMENTS AND OMISSIONS THAT OBSCURE THE ISSUES IN THIS CASE.

### A. The Record Is More Than Sufficient And The Material Facts Are Undisputed.

Respondent's suggestions, never before raised in these proceedings, that the factual record is inadequate are nonsense. None of the courts below found the record inadequate. Indeed, the decision of the trial court was made on the basis of Petitioners' motions for summary

judgment and Respondent's own cross motion for summary judgment.

Remarkably, Respondent now asserts that Petitioners have "failed to prove foreign corporations pay more taxes than domestic corporations pay." Opp. 5. Yet the Department of Revenue's data show that in 1983 domestic corporations paid less than 10% of Alabama's franchise taxes ($5 million out of $52 million), while domestic corporations employed approximately 45% of the total capital employed in Alabama. All of the courts below recognized that foreign corporations pay vastly greater franchise taxes than domestic corporations, both in absolute terms and on average. The Alabama Supreme Court did not question the basic accuracy of the data, but found that (1) adjusting for the 4.5 times larger capitalization of foreign corporations indicated by the 1983 study and (2) aggregating the domestic shares tax with the domestic franchise tax, reduced the degree of discrimination. The remaining discrimination was deemed "no discrimination of constitutional significance". Pet. App. 28a.

Respondent also ignores other undisputed facts showing that the foreign franchise tax discriminates. Principally, the radical difference between the domestic franchise tax base (par value) and the foreign franchise tax base (capital employed in Alabama), allows any Alabama corporation to reduce its franchise tax to $50 per year without affecting its operations in any way. Foreign corporations, on the other hand, must pay franchise taxes, in many cases hundreds of thousands or even millions of dollars per year, based on the actual extent of their operations in Alabama.

### B. Respondent Attempts To Rewrite The Opinion Below.

Respondent's reading of the Alabama Supreme Court's opinion, makes one wonder whether Petitioners and Re-

spondent were furnished the same opinion. Respondent declares:

> Nothing in the court's opinion contends a law does not violate the Commerce Clause as long as that law is not invidiously discriminatory. . . . Opp. at 9.

Yet the court below clearly said exactly that:

> While there are certain differences between this [Commerce Clause] test and the test for application of the Equal Protection Clause, they are sufficiently similar that the bulk of our analysis will not treat them separately.
>
> The question, as we see it, is whether the franchise tax on foreign corporations *invidiously* discriminates against them by imposing a grossly disproportionate tax on them for no other reason than to provide a competitive advantage to domestic corporations. We emphasize the term "invidiously" because the tax will be sustained if its classifications are rationally related to a legitimate state purpose and because, in enacting taxing statutes, legislatures are not required to reach equality with mathematical precision. Pet. App. 18a (original emphasis).
>
> * * * *
>
> Even assuming that the lack of uniformity in the taxes on domestic and foreign corporations rose to a level of discrimination that would invoke equal protection or commerce clause analysis, we would hold that § 40-14-41 does not violate those provisions, for the following reasons. Pet. App. 28a.
>
> * * * *
>
> There is no showing of invidious discrimination or hostile purpose. Rather, a tax that was originally imposed under an express state constitutional mandate not to discriminate against foreign corporations, and that originally did not so discriminate, developed,

in its application and over time, to be somewhat more discriminatory. Pet. App. 29a.

## II. THE FOREIGN FRANCHISE TAX VIOLATES THE COMMERCE CLAUSE.

While asserting that the court below "knows" the difference between the Commerce Clause and Equal Protection Clause, Respondent provides no authority to support the opinion's novel standard that discriminatory taxation against foreign corporations offends the Commerce Clause only if it is (1) invidious, (2) grossly disproportionate and (3) solely for the purpose of providing a competitive advantage to domestic corporations. Such a stringent test, moreover, is an open invitation to widespread discriminatory taxation of foreign corporations.

### A. The Foreign Franchise Tax Discriminates Against Foreign Corporations.

There is no question that the foreign franchise tax discriminates against foreign corporations. The Alabama Supreme Court upheld the tax on the ground that the *degree* of discrimination (18% in 1984, 43% in 1985) was below that court's threshold "of constitutional significance."

To arrive at even this conclusion, the court below was compelled to treat the domestic shares personal property tax as a complementary tax that should be aggregated with the domestic corporate franchise tax. Neither Respondent nor the court below, however, considered or even mentioned this Court's longstanding requirements that the complementary tax doctrine be applied narrowly and only to taxes which tax "substantially equivalent events." This approach nullifies the primary limitations on the doctrine.

### B. Discriminatory Taxation Of Foreign Corporations For The Privilege Of Doing Business Within A State Is Discrimination Against Interstate Commerce.[1]

Perhaps realizing the futility of its argument that the foreign franchise tax does not discriminate against foreign corporations, Respondent asserts that the discrimination does not violate the Commerce Clause "because the tax does not favor intrastate economic activity over interstate economic activity." Opp. 11. Respondent provides no support for its position. Indeed, the authorities cited by Respondent demonstrate that discrimination against foreign corporations *is* discrimination against interstate commerce.[2]

For two fundamental reasons, Respondent's assertion is erroneous. First, this Court has ruled that a tax which discriminates against out-of-state businesses discriminates against interstate economic activity because out-of-state businesses are more likely to engage in such activity than local businesses. *Nippert v. Richmond*, 327 U.S. 416, 431-32 (1946). Second, discriminatory taxation provides a

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[1] Respondent attempts to recharacterize the discrimination, not as a burden on interstate commerce, but instead as discrimination against non-residents uniquely within the purview of the Privileges and Immunities Clause. This unsupported assertion runs contrary to this Court's treatment of the two provisions as "mutually reinforcing" and often overlapping. *See Hicklin v. Orbeck*, 437 U.S. 518, 531-34 (1978).

[2] The authorities cited by Respondent in support of this novel proposition consist of: (1) a number of cases in which the challenged tax was found to discriminate in violation of the Commerce Clause, including one, *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987), in which the Commerce Clause violation resulted from discrimination against trucks registered in a foreign state; and (2) two cases recognizing that the Commerce Clause prohibits discrimination based on geographic location. *Amerada Hess Corp. v. Director, Div. of Taxation*, 109 S.Ct. 1617, 1623-24 (1989); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 (1978).

powerful inducement to a business to either organize in the State or refrain from entering the State altogether, thus depriving it of the ability to make "tax-neutral decisions" essential to fostering the "free trade which the [Commerce] Clause protects." *Boston Stock Exchange v. State Tax Com'n*, 429 U.S. 318, 331, 329 (1977).

In *Nippert v. Richmond*, *supra*, this Court struck down a levy on itinerant merchants because it effectively discriminated against out-of-state merchants, who were more likely than local merchants to operate without a permanent location in the city. In a subsequent opinion, the Court observed that the vice of the tax in *Nippert* was that it "encourage[d] an out-of-state operator to become a resident in order to compete on equal terms." *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72 (1963). Alabama's franchise tax scheme suffers the same infirmity.[3]

## III. IN DETERMINING WHETHER THE DISCRIMINATORY FOREIGN FRANCHISE TAX VIOLATES THE EQUAL PROTECTION CLAUSE, THE ALABAMA SUPREME COURT WAS BOUND BY THE ACKNOWLEDGED PURPOSE OF THE TAX.

This case is perhaps unusual in that the legislative purpose is clear and requires no inquiry by the courts. All of the parties, and the Alabama Supreme Court, ac-

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[3] Respondent's position is in conflict with the highest court of at least one other State. In *Aurora Corp. of Illinois v. Tully*, 60 N.Y.2d 338, 457 N.E.2d 735 (1983), the Court of Appeals of New York, relying heavily on this Court's decisions in *Boston Stock Exchange*, *supra*, and *Halliburton*, *supra*, struck down, on Commerce Clause grounds, that State's license tax on foreign corporations because it "creates an advantage for New York businesses while imposing a burden on foreign corporations." 457 N.E.2d at 739. This conflict provides an additional reason for granting the writ.

knowledge that the tax was enacted for the purpose of avoiding discrimination against foreign corporations. *Louisville & N.R.R. v. State*, 201 Ala. 317, 318, 78 So. 93, 94 (1918), *error dismissed*, 248 U.S. 533 (1918). Where, as here, the purpose is known, it is settled that the State is bound by that purpose.[4] Respondent's proposition that there can be purposes for discriminating which are, on their face, inconsistent with the acknowledged non-discriminatory purpose lacks logic as well as legal basis.

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[4] *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981) ("In equal protection analysis, this Court will assume that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces us to conclude that they 'could not have been a goal of the legislation' ") (citation omitted); *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 530 (1959) ("Having themselves specifically declared their purpose, the Ohio statutes left no room to conceive of any other purpose for their existence").

## CONCLUSION

For the reasons set forth above and in the Petition, this Court should issue a writ of certiorari to review the judgment of the Supreme Court of Alabama, reverse the judgment and remand the case for further proceedings by the court below to determine the remedy to which petitioner is entitled.

Respectfully submitted,

JOHN BARRY DONOHUE, JR.
ROBERT ALAN WARWICK *
* *Counsel of Record*
Reynolds Metals Company
6601 West Broad Street
Richmond, Virginia 23230
(804) 281-4607

BRUCE A. RAWLS
F. A. FLOWERS, III
Burr & Forman
3000 Southtrust Tower
Birmingham, Alabama 35203
(205) 251-3000

WALTER HELLERSTEIN
Professor of Law
University of Georgia,
School of Law
Athens, Georgia 30602
(404) 542-5175

*Counsel for Petitioner*
*Reynolds Metals Company*

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